overpaid some of the beneficiaries were held not to be entitled to recover, but in two subsequent cases *In re Ainsworth*, [1915] 2 Ch. 96 and *In re Musgrave*, [1916] 2 Ch. 417 this decision was not accepted as being of general application. In the latter case Neville J. states "It has been in my opinion the practice of the Court when administering an estate of a deceased person in cases where trustees have under an honest mistake overpaid one beneficiary, in the adjustment of the accounts between the trustees and the *cestui que trust* to make allowance for the mistake in order that the trustee may so far as possible be recouped the money which he has inadvisedly paid." Again in the earlier case of *Dibbs* v. *Goren*, 50 E.R. 904 Lord Langdale M.R. said "Where a trustee takes on himself to act upon his own authority and pays to the parties beneficially interested sums to which they are not entitled, it becomes necessary for this Court to enforce the execution of the trust by recovering back the sum thus received contrary to the trust."

These cases establish a principle which is far wider than any that may be necessary for the decision of the present case. As I have said the persons entitled to the corpus have not been paid anything, but they are liable for a payment which has been wrongly debited to the persons entitled to the income. There is no reason in principle, or on the authorities, why the proper adjustment should not be made. The trustees should prepare a scheme for raising the necessary funds from capital by sale of a part of the immovable property or by means of a mortgage.

The costs of all parties should be taxed as between solicitor and client and paid out of the estate.

Order Accordingly.

Solicitors for plaintiff:—*Claude da Silva & Company.*

Solicitors for trustees:—*Mallal & Namazie.*

Solicitors for S. H. Cheah:—*Mendis & Ahlip.*

[ORIGINAL CIVIL JURISDICTION]

TERRELL, Ag. C.J.

October 11, 1937.

RE CHOONG CHAK CHOON, deceased.

FONG CHOONG CHENG & WONG SAN .....Plaintiffs.

vs.

CHUNG YOK LAM (w) AND OTHERS .....Defendants.

[SINGAPORE ORIGINATING SUMMONS No. 112 of 1937].

Conveyancing and Law of Property Ordinance (Cap. 118) s. 73, sub-s. 1—Moneys payable under an endowment policy of assurance.

As assured effected an endowment policy of assurance for a certain sum on his life expressed to be payable to himself or his assigns if he be living at the maturity of the policy. In the event of his death before the maturity of the policy the sum insured was to be payable to certain named beneficiaries set out in the policy. The assured reserved to himself the power to revoke the named beneficiaries and to appoint new beneficiaries and also to assign charge or surrender the policy without the consent of the named beneficiaries. The assured died before the policy matured leaving a will which did not specifically refer to the policy moneys, nor did he purport to exercise any powers of revocation and new appointment under the policy.

Held, that the trust created by s. 73 of the Conveyancing and Law of Property Ordinance was a valid trust and not having been revoked still subsisted in favour of the named beneficiaries.

In re Ioakimidis' Policy Trusts (1925) 1 Ch. 403 followed.

ORIGINATING SUMMONS.

Burke for the Trustees.

Cheong Thutt Pitt for beneficiaries under the will.

Smith for beneficiaries named in the policy.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

TERRELL, AG. C.J.—The deceased effected an insurance policy with the Great Eastern Life Assurance Company Limited for $20,000 payable on the 5th May 1939 or his previous death.

The policy was an Endowment policy, the premiums being payable half yearly for 10 years, or until the previous death of the assured. Such a policy has been held to be a policy on the life of the insured for the purpose of section 11 of the Married Women's Property Act 1882 which corresponds to section 73(1) of the Conveyancing and Law of Property Ordinance. [See *In re Ioakimidis' Policy Trusts*, (1925) 1 Ch. p. 403].

The material provisions of the policy are as follows: It is expressed to be payable "To the assured or his assigns if he be living at the maturity of the Policy." The policy then continues:—

> "In the event of the death of the Assured before the maturity of the Policy the Company shall pay the monies hereby assured to the Beneficiary named below if then living or to other the Beneficiary appointed by the Assured as hereinafter provided if then living unless prevented by any assignment or other act or thing done or suffered by the Assured during his lifetime and provided there is no statutory or other lawful restriction to the contrary. Provided always that the Assured may at any time by writing signed by him and delivered at the Head Office of the Company at Singapore revoke the appointment of the Beneficiary named below and may appoint another Beneficiary with or without reserving the right of revocation or new appointment. Notwithstanding anything hereinbefore contained it is hereby agreed and declared that the Assured may assign charge surrender or otherwise deal with this Policy without the consent of the Beneficiary whether named in this Policy or subsequently appointed by the Assured hereunder."

The named beneficiaries are:—

"Fun Si, wife of the assured and Chong Chan Fong and Chong Yee Fong, sons of the assured or the survivor or survivors of them."

Fun Si is otherwise known as Faan Ngan Ying and the three beneficiaries are the 2nd, 5th and 6th defendants abovenamed.

The deceased died at the end of 1936, leaving a will appointing the Plaintiffs his executors and trustees. By his will he bequeathed his real and personal estate to his trustees, upon trust for conversion and payment of his funeral and testamentary expenses and debts, and upon trust to divide the balance among 15 named persons. The will did not specifically refer to the policy moneys, nor did the testator purport to exercise any powers of revocation and new appointment under the policy.

It seems to be clear on the authorities that apart from any statutory provision the named beneficiaries are mere volunteers and can claim no rights under the policy. [*re Engelbach's Estate*, (1924) 2 Ch. p. 348]. The question therefore arises whether the provisions of section 73(1) of the Conveyancing and Law of Property Ordinance, coupled with the policy itself, constitutes a valid trust in favour of the beneficiaries.

It will be seen that the interest, such as it is, of the beneficiaries is subject to various contingencies, e.g.

(1) If any of the beneficiaries die before the testator, the gift is in favour of the survivors.
(2) The interest of the beneficiaries is liable to be defeated by the assured revoking their appointment and appointing other beneficiaries.
(3) Such interest may likewise be defeated by the assured assigning, charging or surrendering the policy.

Now the question of a contingency was considered by Tomlin J. in the case of *In re Fleetwoods Policy*, (1926) 2 Ch. p. 48 at p. 53 where he says:—

> "It is true that it (the policy) is expressed to be for the benefit of his wife in a certain event only, but the fact that the benefit is of a limited or contingent character does not prevent it from being a benefit within the meaning of the Act (Section 11 of the Married Women's Property Act 1882). I think therefore that the policy creates a trust in favour of the wife, but only in the terms of the trust."

This passage was cited with approval by Lawrence L.J. in *Cousins* v. *Sun Life Assurance Society*, (1933) 1 Ch. at p. 139. That case decided that the interest of the wife in such a policy vested in her, and passed to her legal personal representative, even if she predeceased her husband, the policy moneys not being payable until his death.

The fact then of the gift being contingent upon the beneficiaries surviving the assured does not prevent the Ordinance from applying. On the same principle I see no reason why section 73 should not equally apply to a policy such as the one now before the Court. It is true that the interest of the beneficiaries was liable to be defeated, but this would only result in an interest, otherwise vested, becoming divested, and in fact such interest has not been divested, and *prima facie* still subsists.

It was suggested that section 21 of the Wills Ordinance might have some application. This section provides that any bequest of personal estate described in a general manner shall be construed to include any personal estate which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear in the Will. This section appears to me to have no application, as a fresh appointment under the policy can only be made by a revocation and new appointment in writing delivered at the Head Office of the Company. Nor can the general bequest in the Will operate as an assignment so as to defeat the statutory trust created by section 73 of the Conveyancing and Law of Property Ordinance.

In my view therefore the trust created by section 73 was a valid trust, and not having been revoked, still subsists in favour of the beneficiaries named in the Policy.

I must refer to Originating Summons 104 of 1925 (Singapore) in which Deane J. in the case of an endowment policy issued by the same Insurance Company delivered a judgment (not reported) to the effect that although the wife was named as a beneficiary, there was no trust in her favour, as the assured had retained a full power of disposition over the policy moneys. In that case however the conditions of the Policy were rather different. In his application, which was part of the contract between the assured and the Company, the assured made the following reservation:—

> "And I reserve the right without the consent of the beneficiary to revoke the appointment of such beneficiary and substitute my own or any other name therefor, and also without such consent to receive every benefit, exercise every right and enjoy every privilege conferred upon the insured by such policy."

Deane J. held that as the assured had an unqualified right of disposition over the policy moneys, such right must pass to his personal representative for the benefit of his estate.

It will be seen that in the case decided by Deane J. the assured seems never to have parted with his beneficial interest in the policy at all, whereas, in the case now before the Court, the assured has made a settlement subject to a right,

which he never exercised, to revoke the settlement. It should also be mentioned that no authorities are referred to in the judgment of Deane J. and it is possible that the report of *In re Ioakimidis Policy Trusts*, (1925) 1 Ch. p. 403 above referred to and which was decided earlier in the same year, was not yet available in the Colony. Furthermore, the cases of *In re Fleetwood's Policy*, (1926) 2 Ch. p. 48 and of *Cousins* v. *Sun Life Assurance Society*, (1933) 1 Ch. p. 126 in which it was held that section 11 of the Married Women's Property Act 1882 might apply even though the interest under the policy was contingent, had not been decided. It is also clear from the decision of Bennett J. in the recent case of *re Gladitz*, (1937) 3 A.E.R. p. 173 that the tendency in England is to give a wide interpretation to section 11 of the Married Women's Property Act, and in that case policy moneys, payable under a Lloyds accident policy with a memorandum indorsed on the policy that all claims under the policy should be payable to the wife of the assured, were held to be settled upon the wife by virtue of the section above referred to.

For these reasons I cannot regard the decision of Deane J. as being an authority which I ought to follow in deciding the issue now before me.

The estate duty on the policy moneys should be paid out of such policy moneys. The costs of all parties should be taxed as between solicitor and client as on a summons in chambers and paid out of the general estate. Under the provisions of Rule 49(1) of Order 62 I allow a fee of $25 per hour for attendance.

Order Accordingly.

Solicitors for the trustees—*John G. Campbell & Co.*

Solicitors for beneficiaries under the will—*Shelley-Thompson & Demuth.*

Solicitors for the beneficiaries named in the policy—*Donaldson & Burkinshaw.*

[APPELLATE CRIMINAL JURISDICTION]

TERRELL, Ag. C.J.

October 29, 1937.

REX v. CHUA ENG HONG.

[SINGAPORE MAGISTRATE'S APPEAL No. 73 of 1937]

Evidence Ordinance (Cap. 13), s. 156 (c)—Impeachment of witness's credibility—Former statements inconsistent with evidence.

The Evidence Ordinance, s. 156 (c) provides that the credit of a witness may be impeached by the adverse party, or with the consent of the Court, by the party who calls him, by proof of former inconsistent statements. Such impeachment of a witness's credibility may render his sworn evidence valueless.

In a case where a District Judge accepted the unsworn statements of a witness, and which were inconsistent with the evidence on oath and where the Court gave no permission to impeach the witness's credibility it was held that such a procedure was quite unjustifiable upon any principle whatever as there was no evidence against the accused at all and he ought never to have been called upon for his defence.

MAGISTRATE'S APPEAL.

Dr. Withers Payne for appellant.

The facts and arguments appear sufficiently from the Judgment.

Cur. Ad. Vult.

TERRELL, AG. C.J.—The accused was charged with, and convicted of causing grievous hurt to one Chua Kan Tong by means of a scythe. The complainant lived alone. He says that his eyes were filled with blood from his injuries. The attack took place during the night, and there is no evidence that there was any light.

It is doubtful whether the complainant was ever in a position to recognise his assailant, and he has stated on oath that he did not recognise him. There was no other witness to the occurrence.

It is necessary therefore to examine the supposed evidence upon which the learned District Judge considered himself entitled to record a conviction.

In paragraph 2 of his grounds of judgment the learned District Judge says:

"But I saw no reason to disbelieve their (the complainant and his witnesses) former statements."

The former statements of the complainant consist of the written information, Exhibit D, and of certain verbal statements alleged to have been made to two police officers. In the information he states that he saw that the accused was his assailant. This statement is however explained by the complainant in the following passage in the course of his evidence at the trial.

> "I did not say Chua Eng Hong was my assailant. At Police Station I was pressed to say who attacked me, but I shook my head as I could not speak. But they pressed me suggesting I must have been attacked in consequence of a love affair. Then I was asked if I had any altercation with anyone, and I said 'Yes, with Chua Eng Hong (the accused), so I gave his name at the 7th mile and also at Hospital" and later
>
> "I do not know why anyone should attack me. I do not know who attacked me."

The complainant's evidence is accordingly that he did not know who attacked him, and he explains how the police got the name of the accused inserted in the information.

But the matter does not rest there. A former statement by a witness is not evidence in itself. Under section 119 of the Criminal Procedure Code a certified copy shall be admitted as evidence of the contents of the original but its use as evidence is governed by the Evidence Ordinance.